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IN THE

Supreme Court of the United States

OCTOBER TERM 1974
NO. 74-532

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Alabama entered in the above case on May 9, 1974.

OPINION BELOW

The Opinion of the Supreme Court of Alabama is appended hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. Mr. Justice Powell of this Court granted to Petitioner an extension to November 3, 1974 within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 U.S.C.* §1257(3).

QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First, Fifth and Fourteenth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary, terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the

average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous".

2. Whether the trial and conviction of the Petitioner under Title 14, Section 374, Code of Alabama, without determination of the obscenity *vel non* of the materials as a material element of the offense violated the First, Fifth, Sixth, and Fourteenth Amendments, because:

(a) The Petitioner was deprived of his right to a fair trial and due process of law because a material element of the offense, obscenity, was not tried and proved, that element being "incorporated" by a prior civil determination of obscenity to which the Petitioner was not a party;

(b) The Petitioner was deprived of his right to a fair trial and due process of law because statute denied him the right of confrontation.

3. Whether the provisions of Title 14, Section 374, Code of Alabama on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his

libery and property without due process of law, in violation of the First, Fifth, and Fourteenth Amendments.

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein where the Indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First, Fifth, and Fourteenth Amendments.

5. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First, Fifth and Fourteenth Amendments.

6. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs and Miller* tests by the

Supreme Court abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First, Fifth and Fourteenth Amendments and Article I, §9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Eighth and Fourteenth Amendments, and Article I, §9 of the Constitution, and the pertinent provisions of Title 14, Section 374, Code of Alabama, appear in Appendix B hereto.

STATEMENT

1. The Petitioner was charged by Complaint that he:

> within twelve months before the commencement of this prosecution, did with knowledge of its contents, exhibit, sell and have in his possession with intent to sell, obscene printed or written material; said material known by him to have been judicially found to be obscene under the provisions of Alabama law, to-wit: a magazine entitled "New Directions Number 16 Volume 4 Number 4," in violation of the Code of Alabama 1940 as recompiled in 1958, Title 14, Section 374(4) pocket part, against the peace and dignity of the State of Alabama.

The verdict of the Jury was rendered on November 10, 1971, the Petitioner being found guilty. He was sentenced to pay a fine of $2000.00 and incarceration for twelve (12) months.

2. Various motions by the Petitioner going to the issue of the exclusion of the obscenity *vel non* question, motions to exclude evidence, and objections to the introduction of evidence from the prior civil action, all of which raised Petitioner's constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments, were overruled by the trial court.

The State just introduced evidence as to the sale of the magazine, and over objection, the determination of the civil finding of obscenity. The trial court instructed the jury that the only issue of fact for their determination was whether or not the Petitioner had sold a magazine judicially declared obscene in an action to which he was not a party.

3. On June 29, 1973, the Alabama Court of Criminal Appeals affirmed the conviction without opinion, and also denied an application for rehearing on July 26, 1973.

4. On May 9, 1974, the Supreme Court of Alabama, upon a Petition for a Writ of Certiorari, affirmed the conviction. The Court, looking at the 1961 Act under which the magazine was declared obscene, held, *inter alia:*

(a) That it was constitutional under the standards enunciated in *Miller v. California,* 413 U.S. 15;

(b) That the relevant community was the State of Alabama;

(c) That the civil action declaring the magazine obscene "established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status.";

(d) That "the status of the res, 'New Directions' being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below, no evidence of obscenity, *vel non,* was required in this case."; and

(e) "The standards under our statute were the same ante *Miller* as they were post Miller." (See Appendix A).

5. The dissenting opinion of Chief Justice Heflin, with whom Justices Coleman, Bloodworth and Jones concurred, held, *inter alia,* that:

(a) the Petitioner was denied a jury trial by the failure of the State to prove and the jury to find the magazine obscene as an essential element of the charged crime, citing *Baldwin v. New York,* 399 U.S. 66 (1970) and *In re Winship,* 397 U.S. 358 (1970).

(b) the Petitioner was denied the right of confrontation because of the use of res judicata or collateral estoppel preventing the Petitioner from defending on the element of obscenity *vel non.*

6. The Supreme Court denied an Application for Rehearing on June 6, 1974.

REASONS FOR GRANTING THE WRIT

1. State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California,* 413 U.S. 15. Title 14, Section 374, Code of

Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the standards set by *Miller*. Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, supra.

Title 14, Section 374(3), Code of Alabama provides that:

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California*.

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested. In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So.2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U.S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 (1957).

In *Miller v. California*, 413 U.S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger, stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

Miller v. California, supra is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to forumulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when

this Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California,* supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press mateials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity. Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person

fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)t is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if

> arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone that if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

2. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not

"sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

This Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453. See also. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *Wright v. State of Georgia*, 373 U.S. 284 (1963); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law,

and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U.S. 221, 235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no constitutionally permissible statute regulating obscenity.

3. The Trial Court viewed the sole issue in the case as being "whether or not the Defendant had knowledge that a particular publication had been judicially determined to be obscene and with that knowledge did he sell or intend to sell the publication." Therefore, the obscenity of the publication, which was not conceded (and is not in this Court) was not passed upon by the jury. The Petitioner should have been able to have the issue of obscenity litigated in his trial, if for no other reason than that in a criminal trial, a defendant has a right to have every element of the crime proven against him beyond a reasonable doubt. Therefore, if the Trial Court viewed the obscenity as having been proven, then it was only by a civil burden of proof, that is, by a preponderance of the evidence.

It is admitted by the State that Petitioner was not a party to the civil proceeding in which the publication named in the decree was found obscene. Since the decree was conclusive in Petitoner's trial on the issue of obscenity and Petitioner was not allowed to cross-examine the witnesses, if any, proving the magazine was obscene, or the Judge in that action, Petitioner was denied his right to confront the witnesses against him on that issue. *Pointer v. Texas,* 380 U.S. 400; *Douglas v. Alabama.*

These infirmities of Title 14, Section 374(4) and of the Petitioner's conviction thereunder were clearly pointed out in Chief Justice Heflin's dissent (see Appendix A). He stated that "the state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act ... In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned – i.e., the obscenity of the matter sold – and he was denied his right to the protection of the criminal burden of proof. *In re Winship,* 397 U.S. 358 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt ...").

This Court recently reaffirmed the right of confrontation in *Davis v. Alaska,* ____ U.S. ____ 39 L.Ed.2d 347 (1974). Mr. Chief Justice Burger wrote that:

> "we ... conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof ... of petitioner's act.' Douglas v. Alabama, supra, 380 U.S. at 419, 13 L.E.d2d 934. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner.

* * *

> Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1,3 [16 L.Ed.2d 314, 86 S.Ct. 1245]." Smith v. Illinois, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)."

____ U.S. ____, 39 L.Ed.2d at 354-55.

And in a *per curiam* opinion this Court held that a conviction for wilfully contributing to the delinquency of a minor, violated due process because there was no evidence at trial that the defendant sold the item in question, that he knew it had been sold to a minor, that he authorized such sales to minors, or that he was in the store at the time of the sale. *Vachon v. New Hampshire,* ____ U.S. ____, 38 L.Ed.2d 666 (1974). This Court held that:

> This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26." That concession was evidenced at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.
>
> In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant

> evidence as to a crucial element of the offense charged . . . violate[s] due process." Harris v. United States, 404 U.S. 1232, 1233, 30 L.Ed.2d 25, 92 S.Ct. 10 (1971). (Chambers opinion of Douglas J.); Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR2d 1355 (1960); Johnson v. Florida, 391 U.S. 596, 20 L.Ed.2d 838, 88 S.Ct. 1713 (1968); see also Adderley v. Florida, 385 U.S. 39, 44, 17 L.Ed.2d 149, 87 S.Ct.242 (1966).

____ U.S. ____, 38 L.Ed.2d at 669.

Thus, as the Petitioner herein was not permitted to defend himself on the crucial issue of obscenity *vel non*, he was deprived of a fair trial and due process of law.

4. *Title 14, Section 374, Code of Alabama* and the Complaints filed against the Petitioner do not clarify what meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, ____ U.S. ____ 41 L.Ed.2d 590 (1974).

In *Smith v. California*, 361 U.S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling*, supra. Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. And the problem is further compounded by the statute's and the court's preclusion of the Petitioner from defending on the issue of obscenity *vel non* at all.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials". *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith* supra), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United*

States, 354 U.S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), to *Miller v. California,* 413 U.S. 15 (1973), this Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership," possession or sale without proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

First Amendment rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U.S. 479; *Keyishian v. Board of Regents of New York,* 385 U.S. 589; *Dejone v. Oregon,* 299 U.S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental reguilatin. *NAACP v. Button,* 371 U.S. 415; *Shelton v. Tucker,* 364 U.S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that

their presumptively lawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U.S. 513; *NAACP v. Button,* 371 U.S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U.S. 147; *Dombroski v. Pfister,* 380 U.S. 479, then it is necessary that convictions be based on a *knowing* violation of the law, i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling,* supra.

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski,* supra, at 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 U.S. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute

> contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by the burdens of defending prosecutions, however expenditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroksi, supra, at 490-491.

The obscenity statute here involved, Title 14, Section 374, Code of Alabama, purports to punish the knowing possession, sale or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling,* supra), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based are unconstitutional. See *Hamling v. United States,* ____ U.S. ____, 41 L.ed.2d 590 (1974), and *Miller v. California,* 413 U.S. 15.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Alabama.

Respectfully submitted,

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APPENDIX A

THE STATE OF ABALAMA–JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1973-74

Ex Parte: Chester McKinney

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

(Re: Chester McKinney
v.
State of Alabama)

FAULKNER, JUSTICE.

This is a pornography case involving the sale of a magazine entitled "New Directions" after it had been judicially found to be obscene.

"New Directions" is published in North Hollywood, California by Jaybird Enterprises, Inc. The masthead states that it is a "cultural, scientific, educational, and sociological publication produced and distributed to illuminate the conviction that the unclothed human body is worthy of respect and deserving of increased acceptance in our culture . . . Subscription rates, $14.00 per year. Second-class postage paid in North Hollywood, California." A review of its pictures contained in the magazine introduced into evidence as an exhibit reveal photographs of nude men and women exposing their genital organs in a revolting manner; male kissing female body near her genital organ; female kissing male in a like manner; females shown with their legs spread-eagle apart exposing their genital organs; male kissing the female breast; male sitting over female with his genital organ touching her mouth, and many more similar poses–the

magazine contains 61 pages in all. After review of pictures of these grotesque nudes, a person of reasonable sensibilities will conclude that it is no wonder God made man and woman to wear clothes. Without them some are the most unattractive animals in His kingdom.

"New Directions" was one of a number of magazines declared to be obscene in a decree rendered by the Circuit Court of Mobile County on February 26, 1970, in an action styled, *State of Alabama, ex rel Attorney General of Alabama, ex rel District Attorney of the 13th Judicial Circuit of Alabama v. The Magazine, "Jaybird U. S. A.", No. 16, Vol. 4, No. 4; The Magazine, "New Directions", No. 14, Vol. 4, No. 4, et al.*, Case Number 76399. Each of the magazines was determined to be mailable matter and each was declared to be contraband. There appears to be a typographical error in the style of the case which refers to No. 14, Vol. 4, No. 4 of "New Directions". The decree refers to No. 16, Vol. 4, No. 4.

On March 10, 1970, a State attorney accompanied by a State investigator, went to the Paris Bookstall, Birmingham, Alabama, a place of business operated by McKinney, and personally delivered a letter to McKinney informing him that "New Directions" had been judicially declared to be obscene. On March 31, 1970, these officers returned to the Paris Bookstall and purchased the magazine, "New Directions" from McKinney. While there, and with McKinney looking on, and in the presence of the investigator, the State attorney "flipped" through the pages of the magazine. Afterwards, they left, and the investigator signed a complaint charging McKinney with violating Title 14, § 374(4), Code of Alabama 1940, Recompiled 1958,[1] by selling obscene material which

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[1] § 374(4). Importation, sale or possession of obscene printed or written matter; penalties.—[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells,

had been judicially declared to be obscene. McKinney was convicted in a trial before a jury and was given the maximum sentence under the statute. Before retiring, the jury was charged by the court that the only issue of fact for them to decide involved the question of selling material judicially declared obscene as charged in the complaint.

McKinney appealed his conviction to the Court of Criminal Appeals. The appellate court affirmed the trial court without rendering an opinion. Upon his application for rehearing being denied, McKinney filed a petition for certiorari, alleging deprivation of constitutional rights; that this was a case of first impression. We granted certiorari.

(Footnote 1 continued)

exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overrruled. A motion to exclude the evidence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial.

The action in the Mobile Circuit Court was filed pursuant to the provisions of Act No. 856, § 5 through § 11, Acts of Alabama 1961, Vol. II. The court acting as trier of fact found the magazine to be obscene. The 1961 Act defines obscene to mean "lewd, lascivious, filthy and pornographic and *that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.*" (Emphasis added.)

The Act passes the constitutional test laid down by United States Supreme Court decisions. Under *Miller v. California,* ____ U. S. ____, 93 S. Ct. 2607, 37 L.Ed2d 419, the court set out new guides to use in regulating obscene material. State offenses must be limited to works which:

1. Depict or describe sexual conduct which is specifically defined by applicable State law (as written or authoritatively construed) and

2. Taken as a whole, appeals to the prurient interest in sex and

3. Portrays sexual conduct in a patently offensive way, and

4. Taken as a whole does not have serious literary, artistic, political, or scientific value.

The guide for determining what is "patently offensive" or appeals to the "prurient interest" is to be "the average person" applying contemporary community standards. We construe "contemporary community standards" to encompass the State of Alabama. National standards are not required under *Miller.* While a trial court may empanel a jury in an advisory capacity to measure the essentially factual issues of "prurient appeal" and "patent offensiveness" by the prevailing "contemporary community standards" it is not constitutionally required. *Alexander v. Virginia,* ____ U. S. ____, 93 S.Ct. 2803, ____ L.Ed.2d ____ (1973). Furthermore, when the material itself is placed into evidence, "expert" State testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. *Kaplan v. California,* ____ U. S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).

Constitutional safeguards are provided in the Act for one charged with violating its provisions. Section 5 provides for the institution of proceedings for an adjudication in a Circuit Court. (While this section provides that the action shall be filed in a Court of Equity, under the Rules of Civil Procedure adopted by this court on July 3, 1973, there is now only one form of action known as a "Civil Action". Rule 2, Rules of Civil Procedure.) Section 6 of the Act provides the type of complaint to be filed and the allegations which the complaint shall contain. Section 7 provides that an order to show cause shall be issued and service of same, upon the res and the person charged. Section 8 gives the respondent the opportunity to file defensive pleadings and permits answer by amicus curiae. Section 9 provides for maximum promptness of the hearing commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech. The burden is on the State to prove obscenity, vel non, in the adjudication of same.

Section 12 provides,

> "Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act."

We now decide the question of whether the Mobile Circuit Court decree was binding on McKinney since he was not a party to the action and since obscenity, vel non, was not permitted as an issue by the trial court.

The Mobile action was in personam and in rem. The magazine, "New Directions," the subject matter in this case, was one of the res declared by the court to be obscene. The decree of the court, which was not appealed, established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status. *McCann v. Ellis,* 172 Ala. 60, 55 So. 303 (1911). See *Brennen v. Ellis,* 173 Ala. 718, 55 So. 306 (1911); *Jones v. Adler,* 183 Ala. 435, 62 So. 777 (1913). See also *Toole v. State,* 170 Ala. 41, 54 So. 195 (1911), an in rem action against 114 barrels of beer for its condemnation where the court said the status of the property was to be fixed as to all the world.

The status of the res, "New Directions" being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below, no evidence of obscenity, vel non, was required in this case.

The standards under our statute were the same ante *Miller* as they were post *Miller.* We conclude that McKinney, after due notice of the decree, was subject to criminal prosecution for selling material judicially declared obscene.

We note in passing what Mr. Justice Douglas said in his dissent in *Miller:*

> "If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific."

Justice Douglas contends that until there has been a civil proceeding placing the tract beyond the pale, there should be no criminal prosecution.

AFFIRMED.

Merrill, Harwood, Maddox, and McCall, J. J., concur.

Heflin, C. J., Coleman, Bloodworth, and Jones, J. J., dissent.

HEFLIN, CHIEF JUSTICE (Dissenting):

The defendant in this case was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958). That section provides:

> "Every person who, with knowledge of its contents . . . sells . . . or has in his possession with intent to sell . . . any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the

county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined, not more than two thousand dollars for each offense. . . . "

In defendant's trial before a jury, the allegedly obscene matter was entered into evidence, but the jury was charged that the only issue of fact for them to decide was whether the defendant sold material which had been judicially declared to be obscene. Thus there was no finding by the jury that the matter alleged to be obscene was obscene, and indeed no such determination could have been made under the trial court's charge.

In my opinion, the conviction of the defendant under the provisions of Section 374(4) set out above is constitutionally invalid in that the statutory procedure operates as a denial of due process of law because: (1) The defendant was denied his right to a trial by jury on a material element of an alleged offense, (2) the defendant was denied the protection of the burden of proof requirements in criminal cases, and (3) the defendant was denied his right of confrontation.

The procedure for obtaining a civil judicial determination of the obscenity of mailable matter is outlined in Sections 374(5)-374(16) of Title 14.

Without passing judgment on the constitutionality of the equity action itself, which is not here in issue, the operation of the statute can be summarized as providing the state an opportunity to have matter declared obscene and to obtain an injunction against *named respondents* prohibiting the sale or distribution of the offending matter by the *named respondents*. Section 374(12) purports to tie the injunction procedure to the punitive provisions of Section 374(4) which, in pertinent part, declares the sale or exhibition of mailable matter that has been judicially found to be obscene under Sections 374(5)-374(16) to be a misdemeanor.

While the legislature of this state has the power to declare certain acts criminal, this power is not unlimited. The state cannot punish as a crime, for example, acts which are specifically protected by the Constitution. Thus the state generally cannot make criminal the act of selling or exhibiting all books, photographs, drawings or other like matter because of the limitation imposed on the states by the First Amendment. Certain materials, however, because of their nature, have been held to lie outside the protective umbrella of the First Amendment. One class of matter which is not protected by the First Amendment is that which is said to be "obscene." Because obscene matter does lie outside the protective shield, the state's police power may be invoked to regulate such unprotected matter.

The regulation of obscene matter may take several forms, including criminal sanctions against those who traffic in it. For the criminal sanctions to be constitutionally permissible it is clear that there must be as a minimum some designated act such as a sale, exhibition, etc., of some unprotected (i.e., obscene) matter. The essential elements of the crime then are at least a (1) transaction involving (2) obscene matter. Each of these elements is a material ingredient without which there is no crime.

It is settled law that in a criminal prosecution the state must prove every essential element beyond a reasonable doubt. E.g., *Piano v. State*, 161 Ala. 88, 43 So. 803 (1909).

Whether the trier of fact is a judge alone or a jury, the burden is the same—every material element of the crime must be proved beyond a reasonable doubt. Where the right to a jury trial attaches, the right attaches to *every* element, and not just certain elements of the crime. In the case at hand, since the possible punishment was one year in jail and a fine of up to $2,000, there is no doubt that the defendant was constitutionally entitled to a jury trial. *Baldwin v. New York*, 399, U. S., 66 (1970).

In short, the state may make it a crime for a person to sell, exhibit, etc., obscene matter, but in prosecuting the person for that crime, the state must prove to a jury every element of the crime beyond a reasonable doubt.

Under this analysis, the infirmity of the statute becomes obvious. The state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act. (Injunctive proceedings were equitable until the new Alabama Rules of Civil Procedure went into force and effect. Now such proceedings are classified as non-jury under the merged one form of action. See Rule 2–ARCP.)

While it is conceded that there may be some set of circumstances under which such a procedure may be permitted, it cannot be utilized to prevent a criminal defendant from full enjoyment of his constitutional rights. In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned–i.e., the obscenity of the matter sold–and he was denied his right to the protection of the criminal burden of proof. *In re Winship*, 397 U. S. 358 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . .")

Furthermore, there is still another constitutional defect to the procedure. In effect, the state is attempting to statutorially engraft the principles of res judicata and collateral estoppel in a criminal prosecution. While arguably this legislative attempt could be challenged as a violation of the doctrine of separation and unconstitutional under the Alabama Constitution, Art. 1 Sec. 43, see *Broadway v. State*, 257 Ala. 414, 60 So. 2d 701 (1952) (no legislative competency to create a duty on the part of a court without exercising any discretion or judgment when a performance of that duty is an exercise of a judicial function), an even more obvious defect in the statute has been identified.

To permit the affirmative use of these concepts by the prosecution would violate another fundamental guarantee of the Bill of Rights–the right of confrontation. An excellent analysis of this problem is found in Hirsch & Ryan, I Know It When I Seize It: Selected Problems in Obscenity, *4 Loyola U. L. Rev.* 9, 76-81 (1971). In the author's hypothetical situation the assumption is made that the state convicts *A* in X County for selling obscene matter. Since the threshold issue in *A*'s case was the obscenity of the matter, *A*'s conviction operates as a judicial determination of the obscenity of the matter. The authors' analysis continues:

> "Subsequently, the People undertake prosecution of defendant B in Y county, or any number of defendants in numerous counties, concerning the identical material. The threshold issue is again the obscene nature of the identical material. The People may attempt to raise the prior adjudication on this element as the subsequent action(s) concerns the identical issue; there is a final adjudication on the merits by a court of competent jurisdiction; and the party against whom the adjudication is raised, the material, was a party to the prior adjudication. . . .
>
> * * * *
>
> "Were these concepts operative in a vacuum of pure theory, independent of other considerations, the foregoing would seem to permit the prosecution's utilization of these concepts in subsequent proceedings. However, to permit such affirmative use of the concepts by the prosecution would affront one of the fundamental guarantees of the Bill of Rights–the right of confrontation.
>
> "This guarantee was held applicable to the states in Pointer v. Texas [380 U. S. 400 (1965)]. Under the instant facts, the People, through utilization of

the prior in rem judgment of obscenity would, if permitted, supply the sine qua non of the in personam criminal proceedings merely by pleading that judgment and interposing the plea of collateral estoppel in answer to any defense attempt to litigate the issue of obscenity. The ultimate effect of such application would be to confront the defense with the core of the prosecutor's case, in documentary form with no provision for cross-examination or confrontation. Such procedures were early condemned indeed, were deemed of primary importance in the enactment of the Sixth Amendment.

"In relation to the concept of collateral estoppel, in a criminal proceeding, courts have been quite reluctant to allow its application in a manner adverse to the defendant. This reluctance is admirably presented in what may be considered the two leading cases in the field. United States v. Carlisi]32 F. Supp. 479 (E.D.N.Y. 1940)] stated the principle to be:

> In transplanting the doctrine . . . to criminal law . . . [a] prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt.

United States v. De Angelo [138 F. 2d 486 (3d Cir. 1943)] emphatically restated the foregoing:

> An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto.

> *While the foregoing decisions considered the applicability of the concept in the realm of a subsequent prosecution of the defendant in a prior action, the rationale precluding application if negative to the defendant is even more compelling in proceedings directed against an individual not an actual party to a prior proceeding, the results of which compel him to defend an in personam criminal proceeding."* (emphasis added) (Footnote omitted)

Furthermore, the case law of this state has long recognized the constitutional invalidity of using a previous civil action as res judicata in a subsequent criminal prosecution. In *Helms v. State,* 35 Ala. App. 187, 45 So. 2d 170 (1950) Judge (now Justice) Harwood summarized this state's law:

"[I]t is clearly settled by the doctrines of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction. Britton v. State, 77 Ala. 202. Conversely, verdicts in criminal cases are not admissible in civil cases arising out of the same transactions. Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 6 L.R.A. 617.

"In Roden and Son v. State, 30 Ala. App. 299, 3 So. 2d 420, 421, Justice Simpson stated that: 'A judgment in a civil case is not conclusive as res judicata in a criminal case, or vice versa, there being no mutuality of parties and a different degree of proof, respectively, being required.'

"In 22 C.J.S., Criminal Law, §50, the general rule, amply supported by authority, is stated as follows: '***it is generally held that a judgment or opinion in a civil action, or the record of proceedings therein, is not admissible in a subsequent criminal prosecution involving the same matter.'

> "The reasons underlying the doctrine are that the parties are not the same; the penalties are not the same; the causes of action are different; the burden of proof is not the same, in that in a civil action the defendant may be forced to testify, while he cannot be compelled to do so in a criminal proceeding."

See also *Jay v. State*, 15 Ala. App. 255, 73 So. 137 (1916).

If a judgment in a civil suit ordinarily cannot be admitted in a criminal prosecution "arising out of the same transaction," can it conceivably be said that a judgment in a civil action in Mobile can be *conclusive* in a criminal prosecution in Birmingham, when the defendant was not even a party to the prior civil action? The answer is so clear as to make a response unnecessary.

In conclusion I would summarize my views in this manner: Our system of criminal justice demands that every person charged with committing a crime be convicted only after having been afforded due process of law. Due process is not variable with the degree of repulsiveness of the crime. Murderers, rapists, kidnappers, and pornographers are entitled to the same element of the due process as embezzlers or pickpockets. These elements of due process include a jury trial on every element of the alleged crime, proof of guilt beyond a reasonable doubt and a right of confrontation. In my view, the provisions of Title 14, Section 374(4) invoked in this case deprives a defendant of all of these rights and thus msut give way to the dictates of the Constitution.

I, therefore, respectfully dissent.

Coleman, Bloodworth and Jones, J. J., concur in the foregoing dissent.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

6. The pertinent provisions of Article I, §9 are:

"***No . . . ex post facto Law shall be passed.***"

7. The pertinent provisions of Title 14, Section 374, Code of Alabama are:

(a) Section 374(3):

" 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

(b) Section 374(4):

Importation, sale or possession of obscene printed or written matter; penalties.–[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under

this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.